

determined there was insufficient evidence in the record to establish respondent met the payroll threshold of K.S.A. 44-505. The ALJ determined this record contained only unproven suggestions that individuals referred to actually were employed by respondent and worked enough hours at sufficient wages to reach the payroll plateau.

Claimant's counsel appeals arguing the facts clearly show claimant was an employee of respondent and the Board should find claimant's death is covered under the Act. Claimant contends respondent's failure to testify should generate an adverse inference in this matter. Claimant requests claimant's minor son be awarded the maximum amount of death benefits and a request is made to award payment of funeral expenses to claimant's mother.

The Kansas Workers Compensation Fund contends claimant's burden is not diminished by respondent's refusal to testify in this matter and claimant must still put forth probative evidence to support his position on each issue. It is the Fund's position that, since claimant has failed to meet his burden, the ALJ's Award denying benefits should be affirmed.

The issues on appeal are as follows:

- "1. Whether respondent was covered by the Kansas Workers Compensation Act.
2. Whether respondent more probably than not met the payroll requirement to be covered by the Workers Compensation Act.
3. Whether claimant and respondent had an employer/employee relationship subject to coverage by the Workers Compensation Act.
4. Whether claimant's death was compensable under the Kansas Workers Compensation Act."¹

FINDINGS OF FACT

On September 1, 2011, an aluminum ladder being used by claimant came in contact with a live power line carrying 7,200 volts of electricity causing him to be fatally electrocuted. The ladder belonged to respondent.

An OSHA Inspection Report states respondent, Brian Granger d/b/a Granger Brothers Roofing, had 4 employees. Granger Brothers Roofing was described as a small company working mostly small jobs that lasted only a couple of days. Most of the business came from word of mouth and friends. Mr. Granger hired people to work with him as

¹ Application for Review at 1 (filed Apr. 17, 2014).

needed. Mr. Granger told OSHA that claimant was an independent contractor, paid in cash. Mr. Granger went on to acknowledge claimant had worked for him on 3-4 jobs. He also stated claimant had worked for other people, but did not know the extent or identity of those other potential jobs.

Mr. Granger was cited for having serious violations from the accident and was fined. The first violation involved using ladders which did not have nonconductive side rails where the employee or the ladder could contact exposed energized electrical equipment. The second violation resulted from the employer's failure to provide a training program for each employee on procedures to be followed to minimize hazards related to ladders and stairways.

Stephanie Griffin, legal guardian and maternal aunt to claimant's son, testified she has been taking care of him since birth, but officially became Griffin's guardian in 2010. Ms. Griffin became aware claimant was working in April 2011, when he made contact with his son. She testified claimant told her he was making between 10 and 15 dollars an hour, depending on the job. Claimant was supposed to pay child support, but she never saw any money. Claimant would instead buy his son gifts. Ms. Griffin stated claimant called to talk to his son once a week until he died. Ms. Griffin testified claimant worked from check to check to support himself and his girlfriend. Claimant's girlfriend is now living with Brian Granger, the respondent owner.

Ms. Griffin was unaware of how many people claimant worked with at Granger Roofing. She was also unaware as to claimant's plans for future work with Granger Roofing. She did understand claimant was not a partner in Granger Roofing. It is Ms. Griffin's understanding that claimant was electrocuted when a ladder he was using got too close to a live wire.

Claimant had a substance abuse problem and spent some time in jail. It was Ms. Griffin's understanding claimant was clean and sober during the time he worked for respondent.

Rhonda Griffin, mother of claimant's son, testified her son lives with her sister due to her and claimant's substance abuse issues. She testified to being clean and sober for the last two years. Rhonda found out claimant was working in April 2011, six months before his death and after he was released from prison. She testified claimant told her he was doing roofing work for a guy named Granger. Rhonda did not have contact with claimant again until July 2011. Rhonda testified claimant told her he was making \$15 an hour working for Granger. It was her understanding that claimant was paid in cash. She was told this by claimant's girlfriend, Brandi Culbertson.

Rhonda later found out claimant died on the job. After that claimant's girlfriend, Brandi, began dating Brian Granger, claimant's boss. Rhonda testified claimant and Brandi dated off and on for five years. Rhonda was not fully aware of claimant's financial

situation, but knew he had an apartment and a stash of cash. According to Rhonda, the day claimant died, Brandi took the stash of cash, along with some of claimant's belongings from his apartment. Rhonda is not sure where the money went that claimant was to be paid for the job he was working on the day he died.

Rhonda testified her boyfriend's son also worked for Brian Granger and a set of twins worked for Brian Granger as well. She estimated Brian Granger had at least five employees. The first time she met Brian Granger was at claimant's funeral.

Brian Granger refused to answer any questions at his deposition. Throughout the deposition, Mr. Granger plead the Fifth Amendment stating he would continue to do so until he could retain counsel. This was the one and only time counsel was able to depose Mr. Granger. The deposition was continued in order to have a telephone conference with Judge Avery to determine how to handle the situation. Mr. Granger was provided notice of the regular hearing and also advised verbally, by claimant's attorney, of the hearing but failed to appear.

James Loghry, Shawnee County Sheriff's Deputy, testified he was called to the scene of an electrocution on the date claimant died. When he arrived another Deputy was present and fire personnel were performing CPR on the victim. Claimant was unresponsive and not breathing. It was determined that an aluminum ladder hit an active power line.

Deputy Loghry briefly spoke with Brian Granger, who reported he was getting supplies from the truck while claimant set up the ladders, when he heard the shock and saw claimant fall. Mr. Granger knocked the ladder down and tried to help claimant, by pouring a bottle of water on him and calling 911. Mr. Granger reported he owned the roofing business and that claimant and another friend worked for him sometimes. Nothing on the job site appeared to belong to claimant.

Steve Nelson, owner of the property where claimant died, testified that on September 1, 2011, he was having some roof work done on his house. The roof repairs were needed for his house and small barn after high winds from a storm blew off some shingles. Mr. Nelson indicated he wanted to get the roof repaired right away because another line of storms was coming and he didn't want water to get in his house. Mr. Nelson did not contact his insurance company and instead found a roofer on his own with the intention of dealing with the insurance claim after the repairs were completed. Mr. Nelson had lived in the house since 1995 and this was the only roof work he had done while living in the house.

Mr. Nelson knew of Brian Granger and his roofing business before he contacted him about doing two separate repair projects. He called Mr. Granger, who came out to look at Mr. Nelson's roof the same day. Mr. Granger agreed to do the work since he was in between jobs at the time. They did not go into much detail about the work to be done. Mr.

Nelson testified Mr. Granger told him he had been performing roof work for a long time and seemed very knowledgeable. Mr. Nelson told Mr. Granger to do what he needed to do to get the job done. Mr. Nelson did not recall Mr. Granger telling him anything about his business, and that he was really willing to take whoever he could get at the time.

Mr. Nelson testified Mr. Granger gave him an estimate of \$2,000 to complete a portion of the job, 50 percent up front and 50 at the completion of the job. Mr. Nelson did not have the paperwork for the entire bid. Mr. Nelson accepted the bid. He paid Mr. Granger in cash.

Mr. Nelson indicated Mr. Granger never mentioned bringing anyone with him, but he also never indicated he would be working alone. He noted that Mr. Granger did have someone with him when he started the job, but Mr. Nelson did not meet the person.

Mr. Nelson was not at home the day claimant died, but he indicated that the roof of the barn on his property was being repaired that day. Mr. Nelson learned of claimant's accident and death after his neighbor called him at work to ask if his wife was okay because there was an ambulance in his driveway. Mr. Nelson testified he called Mr. Granger and was informed that claimant was electrocuted and was being coded at the hospital. He was not given the details of the accident.

Mr. Nelson attempted to speak with the investigators on the scene, but no one would talk to him. From what he could gather, the ladder claimant was on came too close to the power line and electrocuted claimant. Mr. Nelson was not aware if Mr. Granger inspected the work site before beginning work and Mr. Granger certainly did not report any safety concerns to him before beginning the job. Mr. Nelson had no concerns about people working on the roof next to hot wires. He had no idea the wires were not insulated. Mr. Nelson testified Mr. Granger never requested he get the power to his property temporarily shut off so the work could be completed. After claimant was electrocuted and died, Mr. Granger had some other people come out and finish the job because he was unable to.

Mr. Nelson testified a representative from his insurance company did not come out to inspect his roof until after the work was completed on it. He was reimbursed for the payments he made to get his roof fixed.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2011 Supp. 44-501b(a)(b)(c) states:

(a) It is the intent of the legislature that the workers compensation act shall be liberally construed only for the purpose of bringing employers and employees within the provisions of the act. The provisions of the workers compensation act shall be applied impartially to both employers and employees in cases arising thereunder.

(b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.

(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2011 Supp 44-505(a)(2)(3) states:

(a) Subject to the provisions of K.S.A. 44-506 and amendments thereto, the workers compensation act shall apply to all employments wherein employers employ employees within this state except that such act shall not apply to:

...

(2) any employment, other than those employments in which the employer is the state, or any department, agency or authority of the state, wherein the employer had a total gross annual payroll for the preceding calendar year of not more than \$20,000 for all employees and wherein the employer reasonably estimates that such employer will not have a total gross annual payroll for the current calendar year of more than \$20,000 for all employees, except that no wages paid to an employee who is a member of the employer's family by marriage or consanguinity shall be included as part of the total gross annual payroll of such employer for purposes of this subsection;

(3) any employment, other than those employments in which the employer is the state, or any department, agency or authority of the state, wherein the employer has not had a payroll for a calendar year and wherein the employer reasonably estimates that such employer will not have a total gross annual payroll for the current calendar year of more than \$20,000 for all employees, except that no wages paid to an employee who is a member of the employer's family by marriage or consanguinity shall be included as a part of the total gross annual payroll of such employer for purposes of this subsection;

The frustration of the ALJ was apparent in the Award in this matter. Equally frustrated was the attorney for the deceased claimant and his surviving family members. The Kansas Workers Compensation Act is intended to provide benefits when a worker suffers serious injury, or, as in this case, death in a work related situation. That intent was impeded in this instance by the total lack of cooperation by respondent's owner. That, coupled with an almost total lack of business records, has prohibited this claimant from providing necessary information on the amount of gross annual payroll this "employer" generated in either the preceding 2010 calendar year or the 2011 year of this workers death.

The evidence provided generates only speculation as to how much business respondent generated, how many employees actually worked for respondent and how

much they may have been paid. The Award sets out in detail the problems associated with claimant's inability to prove the factors necessary to obtain workers compensation benefits. The Board adopts the Award of the ALJ as its own.

The Board finds the Award of the ALJ denying benefits due to claimant's failure to establish coverage under the Act must be affirmed in this matter.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed. Claimant has failed to prove that the Act applies to this matter pursuant to K.S.A. 2011 Supp. 44-505(a)(2)(3).

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad E. Avery dated April 14, 2014, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of October, 2014.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

The undersigned Board Member dissents from the finding of the majority that claimant failed to prove respondent had a sufficient gross payroll for all employees as required by K.S.A. 2011 Supp. 44-505(a)(2). Claimant died of a work-related accidental

death on September 1, 2011. The record indicates respondent began his business in 2002. Therefore, in order to be covered by the Workers Compensation Act, claimant must prove respondent had a gross payroll of more than \$20,000 for all employees in 2010 and an estimated gross payroll in 2011 of more than \$20,000.

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.² “Burden of proof” means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.”³

Stephanie Griffin testified claimant indicated he made between \$10 and \$15 per hour. Admittedly, Stephanie Griffin did not testify concerning how many hours per week claimant worked for respondent, or how many weeks per year, claimant worked for respondent. Rhonda Griffin estimated five individuals, including claimant, worked for respondent. Again, this Board Member acknowledges Rhonda Griffin did not testify about the wages earned by those individuals or the hours and dates they worked for respondent. Detective Loghry testified he spoke to Brian Granger, who indicated he sometimes employed claimant and another worker.

The testimony of Stephanie Griffin, Rhonda Griffin and Deputy Loghry is uncontroverted. One employee working at the rate of \$10 per hour, 40 hours per week for 50 weeks a year would earn exactly \$20,000 in a year. Brian Granger admitted to Deputy Loghry, of having two employees.

Respondent refused to provide any information concerning the wages he paid his employees in 2010 or 2011. As pointed out by the majority, the intent of the Act was impeded by the total lack of cooperation by respondent's owner. Stated another way, claimant's attempts to determine respondent's gross payroll for 2010 and 2011 was thwarted by respondent “clamming up.” That infers respondent refused to cooperate rather than disclosing payroll information, which would bring him under the Act. Now, respondent is to be rewarded by the denial of benefits for claimant's minor child?

The majority's decision will allow small employers, such as respondent, to pay employees with cash, keep poor or no records, not cooperate when a worker is injured and avoid carrying workers compensation insurance or paying an injured worker benefits he or she deserves. The majority's decision allows some employers to circumvent the purpose

² K.S.A. 2011 Supp. 44-501b(c).

³ K.S.A. 2011 Supp. 44-508(h).

of K.S.A. 2011 44-501b(a), which is to liberally construe the Act for the purpose of bringing employers and employees within the provisions of the Act.

The undersigned Board Member would find claimant met his burden of proof. The uncontroverted testimony of Stephanie and Rhonda Griffin and Deputy Loghry, combined with respondent's refusal to cooperate, convinces this fact finder it is probably true than not, respondent had a gross payroll of \$20,000 for all employees in 2010 and an estimated payroll of \$20,000 in 2011.

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